

## **Chapter 12**

### **Territorial Regimes and Related Issues**

#### **A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES**

##### **1. UN Convention on the Law of the Sea**

###### ***a. Department of State views***

On October 16, 2009, Secretary of State Hillary Rodham Clinton offered strong support for U.S. accession to the 1982 United Nations Convention on the Law of the Sea (“LOS Convention” or “Convention”) in letters to Senator John F. Kerry (D–Massachusetts), Chairman of the Senate Committee on Foreign Relations (“Committee”), and Senator Richard G. Lugar (R–Indiana), the Ranking Member of the Committee. Both letters, which are excerpted below, are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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Recognizing the Senate Foreign Relations Committee’s intention to consider the Convention on the Law of the Sea, I offer my strong support for U.S. accession to the convention.

As you are aware, the convention protects and advances the national security, economic, and environmental interests of the United States. In particular, the convention codifies navigational rights and freedoms critical to U.S. military and commercial vessels and secures U.S. economic rights to natural resources off-shore. In addition, as a party, the United States would have access to procedures that would maximize international recognition and legal certainty for U.S. sovereign rights over offshore resources (including minerals) beyond 200 miles of our coastline.

The United States, as a major maritime power, the country with the largest exclusive economic zone, and one of the largest continental shelves, stands to gain more from this treaty in terms of economic and resource rights than any other country. Having a seat at the table as a party would allow the United States to participate more effectively in the interpretation and development of the convention and the ability to participate formally in its institutions.

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###### ***b. Interagency Ocean Policy Task Force views***

During 2009 the Interagency Ocean Policy Task Force (“Task Force”), which President Barack H. Obama established on June 12, 2009, also stressed the need for the United States to become a party to the LOS Convention. The Task Force’s interim report, issued on September 10, stated:

. . . Our Nation, as a major maritime power and coastal State, has a large stake in the development and interpretation of international law and policy applicable to the ocean, our coasts, and the Great Lakes. Our national security interests are tightly linked to navigational rights and freedoms, as well as to operational flexibility. Our national security and economic interests are also linked to our ability to secure U.S. sovereign rights over resources in extensive marine areas off our coasts, to promote and protect U.S. interests in the marine environment, and to ensure that our maritime interests are respected and considered internationally. The Administration's support for accession to the Law of the Sea Convention reflects several important objectives, including strengthening our Nation's ability to participate in and influence international law and policy related to the ocean.

See

[www.whitehouse.gov/assets/documents/09\\_17\\_09\\_Interim\\_Report\\_of\\_Task\\_Force\\_FINAL2.pdf](http://www.whitehouse.gov/assets/documents/09_17_09_Interim_Report_of_Task_Force_FINAL2.pdf). The President's memorandum establishing the Task Force and accompanying background are available at [www.whitehouse.gov/administration/eop/ceq/initiatives/oceans](http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans).

## **2. Outer Limits of the Continental Shelf**

### ***a. Commission on the Limits of the Continental Shelf and Article 121 of the Law of the Sea Convention***

The United States participated as an observer in the Nineteenth Meeting of the States Parties to the Law of the Sea Convention ("SPLOS"), June 22–26, 2009. Among other things, participants discussed how the Commission on the Limits of the Continental Shelf ("CLCS" or "Commission") should consider a state's submission to establish the outer limits of its continental shelf if it reflects an interpretation of Article 121 of the LOS Convention with which another party to the Convention disagrees. Article 121 provides in part that islands are entitled to continental shelf in accordance with the provisions of the Convention applicable to other land territory but that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no . . . continental shelf."

Under the CLCS Rules of Procedure, the CLCS cannot consider a submission in a case where a land or maritime dispute exists without the consent of all of the parties to the dispute. U.N. Doc. CLCS/40/Rev. 1. The United States expressed the following view:

While this is an important issue, we do not believe it is an instance of an unresolved land or maritime dispute. We note that the Commission has stated that it has no role on matters relating to the legal interpretation of Article 121 of the Convention. Given that, our view is that the Commission should proceed with its work on such a submission, while acknowledging in its recommendations that there is an unresolved question regarding the interpretation of Article 121. We do not take this position because we have an opinion on the substantive issue; we have not expressed an opinion on that matter. Rather, we believe it would be most efficient and cost-effective for the Commission to consider all the technical and scientific aspects of all parts of the submission, so that it does not have to revisit the submission at a later date.

***b. Statement of Understanding concerning a method for establishing the outer edge of the continental shelf***

During the Nineteenth Meeting of the States Parties to the Law of the Sea Convention ("SPLOS"), the United States participated in a side event concerning the application of the Statement of Understanding concerning a specific method to be used in establishing the outer edge of the continental margin, adopted in 1980 as Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea. The U.S. representative expressed the view that the Statement of Understanding can apply to any state with a continental shelf that meets the characteristics specified in the Statement of Understanding, stating:

The Statement of Understanding in Annex II of the Final Act of the Third United Nations Conference on the Law of the Sea was adopted to address the inequity that would result from the application of the formulas in Article 76 to a State whose continental margin has special characteristics. It is our view that the formula contained in the Statement of Understanding can apply to a State whose continental margins meet the special characteristics elaborated in the Statement of Understanding.

### 3. Other Boundary or Territorial Issues

#### *a. South China Sea*

On July 15, 2009, Scot Marciel, Deputy Assistant Secretary, Department of State Bureau of East Asian and Pacific Affairs, testified before the Subcommittee on East Asian and Pacific Affairs of the Senate Committee on Foreign Relations concerning “Maritime Issues and Sovereignty Disputes in East Asia.” In his testimony, excerpted below, Mr. Marciel discussed U.S. efforts to support respect for international maritime law in East Asia’s waterways, U.S. views on sovereignty disputes in the South China Sea, and U.S. concerns about China’s interpretation of international maritime law. Mr. Marciel’s comments concerning freedom of navigation incidents involving China and U.S. naval vessels are discussed below in A.5. The full text of the testimony is available at [www.state.gov/p/eap/rls/rm/2009/07/126076.htm](http://www.state.gov/p/eap/rls/rm/2009/07/126076.htm).

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The United States has long had a vital interest in maintaining stability, freedom of navigation, and the right to lawful commercial activity in East Asia’s waterways. For decades, active U.S. engagement in East Asia, including the forward-deployed presence of U.S. forces, has been a central factor in keeping the peace and preserving those interests. That continues to be true today. . .

Our presence and our policy have also aimed to support respect for international maritime law, including the UN Convention on the Law of the Sea. Although the United States has yet to ratify the Convention, . . . this Administration and its predecessors support doing so, and in practice, our vessels comply with its provisions governing traditional uses of the oceans.

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China, Vietnam, Taiwan, the Philippines, Malaysia, Indonesia, and Brunei each claim sovereignty over parts of the South China Sea, including its land features. . . . The claims center on sovereignty over the 200 small islands, rocks and reefs that make up the Paracel and Spratly Islands chains.

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U.S. policy continues to be that we do not take sides on the competing legal claims over territorial sovereignty in the South China Sea. In other words, we do not take sides on the claims to sovereignty over the islands and other land features in the South China Sea, or the maritime zones (such as territorial seas) that derive from those land features. We do, however, have concerns about claims to “territorial waters” or any maritime zone that does not derive from a land territory. Such maritime claims are not consistent with international law, as reflected in the Law of the Sea Convention.

We remain concerned about tension between China and Vietnam, as both countries seek to tap potential oil and gas deposits that lie beneath the South China Sea. Starting in the summer of 2007, China told a number of U.S. and foreign oil and gas firms to stop exploration work with

Vietnamese partners in the South China Sea or face unspecified consequences in their business dealings with China.

We object to any effort to intimidate U.S. companies. During a visit to Vietnam in September 2008, then-Deputy Secretary of State John Negroponte asserted the rights of U.S. companies operating in the South China Sea, and stated that we believe that disputed claims should be dealt with peacefully and without resort to any type of coercion. We have raised our concerns with China directly. Sovereignty disputes between nations should not be addressed by attempting to pressure companies that are not party to the dispute.

We have also urged that all claimants exercise restraint and avoid aggressive actions to resolve competing claims. We have stated clearly that we oppose the threat or use of force to resolve the disputes, as well as any action that hinders freedom of navigation. We would like to see a resolution in accordance with international law, including the UN Convention on the Law of the Sea.

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The assertions of a number of claimants to South China Sea territory raise important and sometimes troubling questions for the international community regarding access to sea-lanes and marine resources. There is considerable ambiguity in China's claim to the South China Sea, both in terms of the exact boundaries of its claim and whether it is an assertion of territorial waters over the entire body of water, or only over its land features. In the past, this ambiguity has had little impact on U.S. interests. It has become a concern, however, with regard to the pressure on our energy firms, as some of the offshore blocks that have been subject to Chinese complaint do not appear to lie within China's claim. It might be helpful to all parties if China provided greater clarity on the substance of its claims.

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## ***b. Status of Wrangel and other Arctic islands***

In the context of inquiries from the general public, the State Department Bureau of European and Eurasian Affairs issued a fact sheet on the status of Wrangel and other Arctic islands on September 9, 2009. The fact sheet, which is provided below, is also available at [www.state.gov/p/eur/rls/fs/128740.htm](http://www.state.gov/p/eur/rls/fs/128740.htm).

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The U.S.–USSR Maritime Boundary Agreement was signed in 1990. The negotiations that led to that agreement did not address the status of Wrangel Island, Herald Island, Bennett Island, Jeannette Island, or Henrietta Island, all of which lie off Russia's Arctic coast, or Mednyy (Copper) Island or rocks off the coast of Mednyy Island in the Bering Sea. None of the islands or rocks above were included in the U.S. purchase of Alaska from Russia in 1867, and they have never been claimed by the United States, although Americans were involved in the discovery and exploration of some of them.

The U.S.–USSR Maritime Boundary Agreement, signed by the United States and the Soviet Union on June 1, 1990, defines our maritime boundary in the Arctic Ocean, Bering Sea, and

northern Pacific Ocean. The U.S.–USSR Maritime Boundary Agreement is a treaty that requires ratification by both parties before it formally enters into force. The treaty was made public at the time of its signing. In a separate exchange of diplomatic notes, the two countries agreed to apply the agreement provisionally. The United States Senate gave its advice and consent to ratification of the U.S.–USSR Maritime Boundary Agreement on September 16, 1991. [Editor’s note: *See II Cumulative Digest 1991–99* at 1744–45 for additional background on the agreement.]

The Russian Federation informed the United States Government by diplomatic note dated January 13, 1992, that it “continues to perform the rights and fulfill the obligations flowing from the international agreements” signed by the Soviet Union. The United States and the Russian Federation, which is considered to be the sole successor state to the treaty rights and obligations of the former Soviet Union for the purposes of the U.S.–USSR Maritime Boundary Agreement, are applying the treaty on a provisional basis, pending its ratification by the Russian Federation.

The United States regularly holds discussions with Russia on Bering Sea issues, particularly issues related to fisheries management, but these discussions do not affect the placement of the U.S.-Russia boundary or the jurisdiction over any territory or the sovereignty of any territory. The United States has no intention of reopening discussion of the 1990 Maritime Boundary Agreement.

## **4. Piracy**

### ***a. Contact Group on Piracy off the Coast of Somalia***

On January 14, 2009, pursuant to UN Security Council Resolution 1851 (2008) (U.N. Doc. S/RES/1851), the United States hosted the first meeting of the Contact Group on Piracy off the Coast of Somalia (“CGPCS”) at UN Headquarters in New York. Among other things Resolution 1851 encouraged states to establish an international cooperation mechanism to serve as a point of contact for states and organizations conducting counter-piracy efforts near Somalia. *See Digest 2008* at 929–32. Participants adopted a statement, excerpted below, which described the objectives, participation, activities, and structure of the organization. The full text of the statement is available at [www.state.gov/t/pm/rls/fs/130610.htm](http://www.state.gov/t/pm/rls/fs/130610.htm). During the remainder of 2009, the United States participated actively in meetings of the CGPCS and its four working groups. The United States chairs the CGPCS’s working group on strengthening the shipping industries’ self-awareness and other capabilities to counter piracy.

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Pursuant to United Nations Security Council Resolution 1851, the Contact Group on Piracy off the Coast of Somalia (CGPCS) was established on January 14, 2009 to facilitate discussion and coordination of actions among states and organizations to suppress piracy off the coast of Somalia. The CGPCS will report its progress periodically to the UN Security Council. Participating in the meeting were representatives from: Australia, China, Denmark, Djibouti, Egypt, France, Germany, Greece, India, Italy, Japan, Kenya, Republic of Korea, The Netherlands, Oman, Russia, Saudi

Arabia, Somalia TFG, Spain, Turkey, United Arab Emirates, United Kingdom, United States, and Yemen, as well as the African Union, the European Union, the North Atlantic Treaty Organization (NATO), the UN Secretariat, and the International Maritime Organization.

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As an international cooperation mechanism created pursuant to Security Council resolution 1851 to act as a point of contact between and among states, regional and international organizations on aspects of combating piracy and armed robbery at sea off Somalia's coast, the CGPCS will inform the UN Security Council on a regular basis of the progress of its activities, including through providing relevant information to the UN Secretary General for possible incorporation into his periodic reports to the Council.

The CGPCS emphasizes the primary role of Somalia itself in rooting out piracy and armed robbery at sea and the importance of assisting Somalia in strengthening its own operational capacity to fight piracy and bring to justice those involved in piracy.

The Contact Group on Piracy off the Coast of Somalia applauds the efforts countries, industry, and regional and international organizations have taken to address the piracy problem pursuant to Security Council resolutions. Of particular note, the CGPCS applauds the counter-piracy operations that individual nations, Combined Maritime Forces (CMF), NATO and the EU have undertaken during the last six months.

Pursuant to UNSCR 1851, States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia will consider creating a center in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia (the Counter-Piracy Coordination Center) as soon as possible in 2009. Pending the establishment of such a center, the Contact Group will look to put interim arrangements in place. The CGPCS asks participating states, international and regional organizations to support both the interim and follow-on facilities.

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The Contact Group on Piracy off the Coast of Somalia recognizes the importance of apprehending and prosecuting suspected pirates. The CGPCS calls on state parties to implement their obligations under relevant treaties and applicable international law, including in particular the UN Convention on the Law of the Sea, with respect to suppressing piracy, establishing jurisdiction, and accepting delivery of suspected pirates, and to discuss, as appropriate, the applicability of other international instruments including the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"), and the UN Convention Against Transnational Organized Crime.

The CGPCS will examine practical options for strengthening the ability of countries willing to detain and prosecute suspected pirates. It will also examine options for developing other mechanisms to address piracy, including international judicial mechanisms. . . .

The Contact Group on Piracy off the Coast of Somalia reaffirms its respect for Somalia's sovereignty, territorial integrity, and sovereign rights over natural resources, and its participants ensure that their flagged vessels respect these rights.

The CGPCS offers participation to any nation or international organization making a tangible contribution to the counter-piracy effort, or any country significantly affected by piracy off the coast of Somalia. As such, the Contact Group extends invitations to Belgium, Norway, Portugal, Sweden, and the Arab League.

The CGPCS identified six related focus areas: improving operational and information support to counter-piracy operations, establishing a counter-piracy coordination mechanism, strengthening judicial frameworks for arrest, prosecution and detention of pirates, strengthening commercial shipping self-awareness and other capabilities, pursuing improved diplomatic and public information efforts, and tracking financial flows related to piracy.

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Additionally, participating states affirmed the importance of attention to financial flows to pirates and their activities and decided to remain seized of the issue. . . .

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### ***b. New York Declaration***

On September 9, 2009, the United States signed the New York Declaration, committing to “promulgate internationally recognized best management practices” for protecting U.S. ships against piracy. The declaration, which is not legally binding, was signed earlier in 2009 by Panama, the Bahamas, Liberia, and the Marshall Islands. Cyprus, Japan, Singapore, and the United Kingdom also signed the declaration on September 9, and South Korea signed it on September 10. See [www.state.gov/r/pa/prs/ps/2009/sept/128747.htm](http://www.state.gov/r/pa/prs/ps/2009/sept/128747.htm); see also [www.state.gov/r/pa/prs/ps/2009/sept/128768.htm](http://www.state.gov/r/pa/prs/ps/2009/sept/128768.htm). The New York Declaration is available at [www.state.gov/r/pa/prs/ps/2009/sept/128767.htm](http://www.state.gov/r/pa/prs/ps/2009/sept/128767.htm).

## **5. Freedom of Navigation**

In his testimony concerning “Maritime Issues and Sovereign Disputes in East Asia,” discussed in A.3.a. *supra*, Scot Marciel, Deputy Assistant Secretary, Department of State Bureau of East Asian and Pacific Affairs, discussed incidents involving China and U.S. vessels in international waters within China’s exclusive economic zone. Excerpts follow from Mr. Marciel’s discussion of that issue. The full text of his written statement is available at [www.state.gov/p/eap/rls/rm/2009/07/126076.htm](http://www.state.gov/p/eap/rls/rm/2009/07/126076.htm).

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. . . In March 2009, the survey ship *USNS Impeccable* was conducting routine operations, consistent with international law, in international waters in the South China Sea. Actions taken by Chinese fishing vessels to harass the *Impeccable* put ships of both sides at risk, interfered with freedom of navigation, and were inconsistent with the obligation for ships at sea to show due regard for the safety of other ships. We immediately protested those actions to the Chinese government, and urged



that our differences be resolved through established mechanisms for dialogue—not through ship-to-ship confrontations that put sailors and vessels at risk.

Our concern over that incident centered on China’s conception of its legal authority over other countries’ vessels operating in its Exclusive Economic Zone (EEZ) and the unsafe way China sought to assert what it considers its maritime rights.

China’s view of its rights on this specific point is not supported by international law. We have made that point clearly in discussions with the Chinese and underscored that U.S. vessels will continue to operate lawfully in international waters as they have done in the past.

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. . . With respect to freedom of navigation in the EEZ by U.S. naval vessels, we have urged China to address our differences through dialogue. Last month at the Defense Consultative Talks in Beijing, Under Secretary of Defense for Policy Michele Flournoy raised this issue, and the Chinese agreed to hold a special session of our Military Maritime Consultative Agreement (signed in 1998) to take up this issue and seek to resolve differences.

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## **6. Maritime Security and Law Enforcement**

### ***a. Shiprider agreement with Canada***

On May 26, 2009, Secretary for Homeland Security Janet Napolitano and Canadian Minister of Public Safety Peter Van Loan signed the Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations between the Government of the United States of America and the Government of Canada. The agreement establishes a permanent shiprider arrangement, enabling joint U.S.–Canadian law enforcement teams to conduct operations along the two countries’ maritime border “to prevent, detect, suppress, investigate, and prosecute criminal offences or violations of law including, but not limited to, illicit drug trade, migrant smuggling, trafficking of firearms, the smuggling of counterfeit goods and money, and terrorism.” Article I.

“Shiprider is a critical security partnership between the United States and Canada, improving our cross-border operations,” said Secretary Napolitano in concluding the agreement. “Through coordinated enforcement along our shared waterways, we can better interdict offenders trying to flee across our maritime border.” See Department of Homeland Security press release, dated May 26, 2009, available at [www.dhs.gov/ynews/releases/pr\\_1243354565323.shtm](http://www.dhs.gov/ynews/releases/pr_1243354565323.shtm). The DHS press release continued:

Shiprider enables the [Royal Canadian Mounted Police] RCMP and the U.S. Coast Guard to cross-train, share

resources and personnel and utilize each others' vessels in the waters of both countries, such as the Great Lakes and St. Lawrence Seaway. Working together, Canadian and U.S. law enforcement will help ensure that criminal organizations no longer exploit the shared border and waterways because of the inherent jurisdictional challenges associated with cross-border policing.

For example, Article 7 of the agreement requires the central authorities for the two parties (the Royal Canadian Mounted Police and the U.S. Coast Guard) to

coordinate the development of and approve a joint training program for designated cross-border maritime law enforcement officers that includes training on the applicable laws, regulations, constitutional considerations and policies of both Parties, and in particular, depending on the anticipated role of the integrated cross-border maritime law enforcement officer, those pertaining to:

- (a) the use of force, marine safety, operational procedures and protection of informants and other sensitive information; and
- (b) aviation regulations and flight safety procedures.

The agreement also includes an article concerning custody of persons, vessels or things detained or seized in the course of joint operations. That article provides in part that "[i]n all cases where a person, vessel, or thing is detained or seized, during the course of an integrated cross-border maritime law enforcement operation, such person, vessel, or thing shall be dealt with in accordance with the laws of the host country." Article 10(1).

Pursuant to Article 19, the agreement will enter into force upon an exchange of diplomatic notes confirming that each party has completed its necessary internal procedures. The United States has completed the procedures necessary to bring the agreement into force for the United States as an executive agreement. As of the end of 2009, Canada was taking the steps necessary to allow it to enter into force for Canada. The agreement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

### ***b. Agreement with Sierra Leone***

On June 26, 2009, the United States and Sierra Leone concluded an agreement concerning cooperation to suppress illicit transnational maritime activity. Article 1.1 of the agreement defines “[i]llicit transnational maritime activity” to mean “illegal activities prohibited by international law, including international conventions to which both the Government of the Republic of Sierra Leone and the Government of the United States of America are party, but only to the extent enforcement is authorized by the laws of both Parties; and including without limitation ‘illicit traffic’ as defined in Article 1(m) of the 1988 Convention [against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances].” The agreement contains shiprider provisions to permit members of the U.S. Coast Guard and the Sierra Leone Armed Forces to embark on the other state’s ships or aircraft to conduct joint maritime law enforcement operations. The agreement also authorizes the Coast Guard, under certain conditions, to investigate, board, and search suspect vessels in Sierra Leone’s territorial sea or internal waters if no Sierra Leone official is embarked on the Coast Guard ship. In such circumstances, the agreement also authorizes the Coast Guard, if evidence of illicit transnational maritime activity is found, to detain the vessel, cargo, and persons on board pending instructions from the Sierra Leone Armed Forces.

The agreement is also a shipboarding agreement. It authorizes the Coast Guard and the Sierra Leone Armed Forces, under certain circumstances, to board, search, and detain suspect ships in international waters that claim the nationality of the other state without the presence of officials from that state. The agreement also authorizes the Coast Guard or the Sierra Leone Armed Forces to detain the suspect ships, cargo, and persons on board pending disposition instructions from the other state’s authorities. The agreement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

### ***c. Shiprider agreement with Tonga***

On August 24, 2009, the United States and the Kingdom of Tonga concluded an agreement concerning cooperation in joint maritime surveillance operations. The agreement contains “shiprider” provisions, permitting officers of Tonga’s Tonga Defense Services, Ministry of Fisheries, and Ministry of Transport to ride aboard U.S. Coast Guard vessels and aircraft to conduct joint operations. For example, Tonga’s embarked officers are empowered to grant Coast Guard vessels entry into Tonga’s territorial sea to assist Tonga’s authorities in stopping, boarding, and searching vessels suspected of violating Tonga’s laws and assist in arresting suspects and seizing contraband and vessels. The agreement also permits Coast Guard vessels and aircraft, with Tonga’s officers on board, to assist in fisheries surveillance and law enforcement activities in Tonga’s exclusive

economic zone. The agreement further empowers Tonga's embarked officers to permit the Coast Guard to stop, board, and search vessels located seaward of any state's territorial sea and claiming Tonga's nationality.

The agreement was the sixth shiprider agreement the United States has concluded with Pacific Island States. Under the 1988 Multilateral Treaty on Fisheries between the United States and the nations of the Pacific Forum Fisheries Agency ("FFA"), the United States and the Pacific Island States cooperate closely on fisheries issues, and the shiprider agreements have grown out of that cooperation. See testimony of William Gibbons-Fly, Director, Office of Marine Conservation, Bureau of Oceans, Environment and Science, Department of State, before the Subcommittee on Insular Affairs, Oceans and Wildlife of the U.S. House of Representatives Committee on Natural Resources on March 19, 2009, available at [http://resourcescommittee.house.gov/images/Documents/20090319iaow/testimony\\_gibbons-fly.pdf](http://resourcescommittee.house.gov/images/Documents/20090319iaow/testimony_gibbons-fly.pdf). The agreement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). For discussion of the agreements concluded in 2008 with Kiribati, the Cook Islands, the Marshall Islands, the Federated States of Micronesia, and Palau, see *Digest 2008* at 649–50.

## 7. Marine Scientific Research

The United States participated in the ninth meeting of the Intergovernmental Oceanographic Commission's ("IOC") Advisory Body of Experts on the Law of the Sea ("ABE-LOS"), held at UNESCO Headquarters in Paris, France, March 30–April 3, 2009. ABE-LOS provides advice, upon request of the IOC, on the IOC's role in relation to the UN Convention on the Law of the Sea ("LOS Convention" or "Convention"). At its forty-first session, June 24–July 1, 2008, the IOC Executive Council had requested ABE-LOS to continue its work concerning the legal framework applicable to the collection of oceanographic data. See *Digest 2008* at 653–56 for background on ABE-LOS's work on this issue and U.S. views on it.

At ABE-LOS IX, participants decided that ABE-LOS does not have a mandate to draft implementing procedures for the Guidelines for the deployment of Argo floats on the high seas,<sup>\*</sup> which the IOC adopted in 2008. Participants decided instead that the IOC Executive Secretary should draft such procedures with relevant bodies that oversee the Argo Programme. The meeting also decided that no Guidelines are needed for deployment of floats or drifting buoys into exclusive economic zones ("EEZs") or for deployment of expendable bathythermographs ("XBTs")<sup>\*\*</sup> by

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<sup>\*</sup> Editor's note: See [www.argo.ucsd.edu/FrFAQ.html](http://www.argo.ucsd.edu/FrFAQ.html) for background on Argo floats.

<sup>\*\*</sup> Editor's note: According to the National Oceanic and Atmospheric Administration, the Expendable Bathythermograph ("XBT") is a probe oceanographers use "to obtain information on

ships of opportunity into EEZs. During the discussions that led to the ABE-LOS experts' decisions, the United States reiterated its position that the routine collection of ocean observations, such as temperature, pressure, current, salinity, and wind, in an EEZ is not marine scientific research ("MSR") governed by Part XIII of the LOS Convention, requiring the consent of the coastal state. The U.S. delegate stated:

The routine collection of ocean observations in near-real time that are distributed freely and openly and are used for monitoring and forecasting of ocean state, for weather forecasts and warnings, and for climate prediction is analogous to the collection of marine meteorological data and therefore is not scientific research regulated by Part XIII of the Law of the Sea Convention.

## 8. Marine Casualty Code

On June 29, 2009, the U.S. Embassy in London transmitted a diplomatic note to the International Maritime Organization ("IMO"), conveying the U.S. objection to the amendments to Chapter XI-1 to the International Convention on the Safety of Life at Sea ("SOLAS"), which the IMO's Maritime Safety Committee adopted on May 16, 2008. Absent objection, these amendments make mandatory for SOLAS Contracting Governments Parts I and II of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident ("Casualty Code"). The amendments also provide that Part III of the Casualty Code "should be taken into account to the greatest extent possible." SOLAS, to which the United States is a party, establishes requirements for the safe and secure operation of ships. The Casualty Code establishes minimum standards and, for the most part, a uniform approach for investigating maritime casualties.

The United States participated actively in negotiating the Casualty Code, including by chairing the working group assigned to develop it. In most respects, the Casualty Code incorporates practices the U.S. Coast Guard and the U.S. National Transportation Safety Board already employ, but, as explained in the U.S. diplomatic note, other aspects of the Casualty Code would make mandatory practices that would conflict with important aspects of U.S. domestic law and practice without directly promoting maritime safety. For example, the Casualty Code would mandate certain

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the temperature structure of the ocean to depths of up to 1,500 meters. [It] is dropped from a ship and measures the temperature as it falls through the water." See [www.aoml.noaa.gov/goos/uot/xbt-what-is.php](http://www.aoml.noaa.gov/goos/uot/xbt-what-is.php).

legal and procedural rights for seafarers that exceed the protections granted under U.S. law. See *Digest 2007* at 660 for additional background.

The U.S. objection prevented the amendments from entering into force automatically with respect to the United States. Under SOLAS's tacit amendment procedure, an IMO-approved amendment enters into force automatically for a party unless that party objects to the amendment before the date on which the amendment is deemed "accepted" (SOLAS, Articles VIII(b)(vi)(2) and VIII(b)(vii)(2)). In adopting the Casualty Code, the IMO established July 1, 2009, as the "acceptance" date and January 1, 2010, as the date for the amendments to enter into force. The substantive portions of the U.S. diplomatic note are set forth below, and the full text of the note is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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The Embassy of the United States has the honor to refer to the Amendments to Chapter XI-1 to the International Convention on the Safety of Life at Sea (the Convention), adopted by Resolution 257(84) of the Maritime Safety Committee on May 16, 2008. Specifically, Resolution 257(84) made parts I and II of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident mandatory under the Convention.

On behalf of the Government of the United States of America, the Embassy has the further honor to inform your Excellency, in your capacity as depositary for the Convention, that the Government of the United States of America objects to the above-described amendments to Chapter XI-1 of the Convention because certain provisions of the Code do not directly promote maritime safety and conflict with important aspects of U.S. domestic law and practice.

We have the honor to request that your Excellency therefore notify the Contracting Governments to the Convention that these amendments will not enter into force for the United States on January 1, 2010.

## **9. Salvage at Sea**

### ***a. Naval shipwrecks***

As discussed in Chapter 10.A.1.d., on December 22, 2009, the U.S. District Court for the Middle District of Florida dismissed claims to artifacts from a shipwreck site discovered in international waters for lack of subject matter jurisdiction and vacated a related arrest warrant. *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126 (M.D. Fla. 2009). According to the report and recommendation of the magistrate judge, dated June 3, 2009, which the district court adopted and incorporated into its order, Odyssey Marine Exploration Inc. ("Odyssey") initiated the *in rem* action after discovering the shipwreck in international waters off the Strait of Gibraltar in March 2007. Odyssey sought possessory rights and ownership over the items it had retrieved, along with all of the artifacts remaining at the site of the wreck. Alternatively, Odyssey sought a

salvage award under the law of salvage. Peru (based on its claim that the coins found at the shipwreck site had their origins in Peru) and 25 descendants of persons, who are alleged to have had their property on board the ship when it sank, also filed claims to the items at the shipwreck site.

In granting Spain's motion to dismiss, the court accepted the magistrate judge's conclusion that the shipwrecked vessel was the *Nuestra Señora de las Mercedes*, a Spanish naval vessel that exploded and sank in 1804 after the British Navy intercepted and fired on it while the ship was sailing from the Spanish colonies in South America. The court stated:

. . . [T]he *Mercedes* is a naval vessel of Spain and . . . the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain and are entitled in good conscience and in law to lay undisturbed in perpetuity absent the consent of Spain and despite any man's aspiration to the contrary. That the *Mercedes* is now irreparably disturbed and her cargo brought to the United States, without the consent of Spain and athwart venerable principles of law, neither bestows jurisdiction on the United States to litigate conflicting claims of ownership (to all or part of the cargo) nor empowers the United States to compel the sovereign nation of Spain to appear and defend in a court of the United States.

*Id.* at 1129.

As discussed in Chapter 10.A.1.d., the basis for the magistrate judge's report and recommendation to dismiss the case was an analysis of the Foreign Sovereign Immunities Act ("FSIA"). As the magistrate judge noted, however, § 1609 of the FSIA requires claims of immunity to be evaluated "subject to existing international agreements to which the United States is a party." The magistrate judge then described two such agreements and their relevance to Odyssey's claims:

. . . As Spain emphasizes, and as the Fourth Circuit has specifically held, Spain's sovereign vessels are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 638, 642–643 (4th Cir. 2000). Per its provisions, "[i]n cases of shipwreck . . . each party shall afford to the vessels of the other, whether belonging to the State or to individuals the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases." Treaty of Friendship and

General Relations, U.S.–Spain, Art. X, July 3, 1902, 33 Stat. 2105; [fn. omitted] *see also Sea Hunt, Inc.*, 221 F.3d at 642. In short, this treaty is “unique” and requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States.” *Sea Hunt*, 221 F.3d at 642. [fn. omitted]

The United States protects its sunken warships. *See* Geneva Convention on the High Seas, Art. 8, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (“Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State”); Sunken Military Craft Act, Pub. L. No. 108–375, § 1406, 118 Stat. 2094 (codified at 10 U.S.C. § 113 note) (October 28, 2004) (“The law of finds shall not apply to . . . any foreign sunken military craft located in United States waters”; and “[n]o salvage rights or awards shall be granted with respect to . . . any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state.”); [fn. omitted] Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property, 69 F.R. 5647–01, 5648 (Feb. 5, 2004) (President Clinton’s January 19, 2001, statement expressing concern that recent technological advances made the unauthorized disturbance of sunken State craft possible and stating the United States “recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea;” sunken warships “may contain objects of a sensitive . . . archaeological or historical nature.”); [fn. omitted] *see also International Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1258–60 (11th Cir. 2000) (determining law of salvage and not law of finds applied to navy bomber that crashed in international waters where the United States had not abandoned its interests in ships sunk over a century ago); *Sea Hunt*, 221 F.3d at 647 (noting the United States’ interest is “rooted in customary international law;” the “[p]rotection of the sacred sites of other nations thus assists in preventing the disturbance and exploitation of our own.”); *United States v. Steinmetz*, 763 F. Supp. 1293, 1299 (D.N.J. 1991) (reciting the State Department’s position that warships and their remains are “clothed with sovereign immunity and therefore



entitled to a presumption against abandonment of title”),  
*aff’d*, 973 F.2d 212 (3d Cir. 1992).

*Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d at 1143–44.

In a Statement of Interest and brief as *amicus curiae* supporting Spain filed on September 29, 2009, after the magistrate judge issued his report and recommendation, the United States also addressed the 1902 Treaty of Friendship and General Relations between the United States and Spain (“1902 Treaty”). The United States did not take a position on the factual disputes between the parties; instead, in addressing the protections and immunities the *Mercedes* and its cargo would be entitled to under the 1902 Treaty, it assumed, as the Magistrate Judge had found, that the shipwrecked vessel was the *Mercedes* and that the *res* recovered by Odyssey came from the *Mercedes*, a warship of the Spanish Royal Navy that Spain has not abandoned. As the government stated:

Article X of the Treaty provides, “In cases of shipwreck, damages at sea . . . each party shall afford to the vessels of the other . . . the same assistance and protection and the same immunities, which would have been granted to its own vessels in similar cases.” Spain, the United States, and a U.S. Court of Appeals all interpret this language to require the United States to extend to Spain the same protection and immunities the United States customarily affords to its own sunken vessels. *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F.3d 634, 643 (4th Cir. 2000) . . . [T]hose protections and immunities include the rules that (1) sunken state vessels are not deemed abandoned absent a clear and affirmative sovereign act, and (2) sunken state vessels shall not be disturbed or subject to salvage without express sovereign consent.

The full text of the U.S. brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). Odyssey, the Republic of Peru, and the individual claimants appealed the dismissal to the U.S. Court of Appeals for the Eleventh Circuit.

#### ***b. UNESCO Convention on the Protection of Underwater Cultural Heritage***

On March 26–27, 2009, the United States participated as an observer in the first meeting of the states parties to the UNESCO Convention on the Protection of Underwater Cultural Heritage (“UNESCO Convention”). Excerpts follow from the U.S. statement, reaffirming U.S. support for the goal to protect underwater cultural heritage and the protective Rules established in

the Annex to the UNESCO Convention, discussing U.S. efforts to protect underwater cultural heritage, and noting U.S. concerns with other aspects of the UNESCO Convention. For discussion of U.S. concerns expressed at the time of conclusion of the UNESCO Convention, see *Digest 2001* at 693–95. The full text of the U.S. statement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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The United States uses this occasion to re-affirm its support of the overall goal of this UNESCO Convention to protect underwater cultural heritage. The United States fully supports the Annex of Rules concerning activities directed at underwater cultural heritage.

Since the conclusion of the negotiations on this Convention in 2001, the United States has taken several steps to protect underwater cultural heritage, in a manner consistent with customary international law, as reflected in the United Nations Convention on the Law of the Sea. For example, the United States enacted a new law, the Sunken Military Craft Act of 2004, to ensure protection of both sunken U.S. military craft, wherever located, and sunken foreign military craft located in U.S. waters (landward of the 24nm limit of the contiguous zone). The Sunken Military Craft Act provides that the law of finds does not apply to any U.S. sunken military craft, wherever located, or to any sunken foreign military craft located in U.S. waters, in a manner consistent with customary international law and the interests of Flag States. The law also extensively protects all U.S. sunken military craft and sunken foreign military craft in U.S. waters from the application of the law of salvage by prohibiting the issuance of any salvage rights or awards under salvage law, unless expressly authorized by the flag State of the sunken military craft. The Sunken Military Craft Act clarifies that sunken military craft of the United States remain U.S. property and that right, title, and interest of the United States are not extinguished except by express divestiture of title by the United States. Further, this U.S. law encourages the United States to negotiate bilateral and multilateral agreements to protect sunken military craft. To date, the United States has cooperated with several foreign nations on the protection of their sunken State craft in U.S. waters and has provided technical assistance for underwater cultural heritage research projects outside of U.S. waters.

Another example of measures the United States has taken to protect underwater cultural heritage is the negotiation, with Canada, France, and the United Kingdom, resulting in the International Agreement Concerning the Shipwrecked Vessel R.M.S. *Titanic*. The United States signed this Agreement in 2004 and has made considerable efforts toward promoting the protection of the sunken vessel, its wreck site, and its artifacts. This includes developing proposed implementing legislation for the Agreement consistent with the historic preservation principles in the UNESCO UCH Convention and its Annexed Rules. In addition, in 2001, the U.S. Department of Commerce's National Oceanic and Atmospheric Administration published Guidelines for Research, Exploration and Salvage of R.M.S. *Titanic* that are similar to the Annexed Rules of the UNESCO UCH Convention.

The Annexed Rules of the UNESCO UCH Convention are a valuable contribution to the protection of underwater cultural heritage. A number of United States federal and state agencies currently use the Annexed Rules as a guide in the protection and management of underwater cultural heritage located in national marine sanctuaries, national parks, and national monuments, including in the national marine monument in the Northwestern Hawaiian Islands, the

Papahānaumokuākea National Monument. [Editor's note: *See Digest 2007* at 705–6 and *Digest 2008* at 702–3 for discussion of the Papahānaumokuākea National Monument.]

These actions illustrate that the United States cares about and is actively taking steps to protect underwater cultural heritage. The United States believes that a broadly ratified Convention is a useful means through which to achieve the protection of underwater cultural heritage. The United States supported and actively participated in the negotiations here at UNESCO to develop a multilateral instrument to protect underwater cultural heritage. The resulting Convention, especially in the Annexed Rules, preamble, and general principles, reflects substantial progress by the global community in developing means to protect submerged cultural heritage. However, the United States continues to have serious concerns with certain provisions in the Convention. These concerns have prevented our country from becoming a State Party. For example, the United States cannot join a convention that is not consistent with the jurisdictional regime set forth in the United Nations Convention on the Law of the Sea. The United States hopes that there will be future opportunities to discuss the concerns that have prevented our country, and others, from joining this Convention. We also look forward to opportunities to discuss some of the means by which States may cooperate, including through scientific and technical exchanges, to protect underwater cultural heritage.

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## **B. OUTER SPACE**

On October 19, 2009, Garold N. Larson, Alternate Representative to the First Committee, addressed the General Assembly's First Committee about disarmament concerns and outer space. Excerpts follow from Mr. Larson's comments concerning the Obama administration's commitment to upholding international law applicable to outer space. The full text of the U.S. statement is available at <http://usun.state.gov/briefing/statements/2009/130701.htm>.

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In consultation with allies, the Obama Administration is currently in the process of assessing U.S. space policy, programs, and options for international cooperation in space as a part of a comprehensive review of space policy. This review of space cooperation options includes a “blank slate” analysis of the feasibility and desirability of options for effectively verifiable arms control measures that enhance the national security interests of the United States and its allies. The United States looks forward to discussing insights gained from this Presidential review next year at the Conference on Disarmament during substantive discussions on the Prevention of an Arms Race in Outer Space agenda item as a part of a consensus program of work.

Mr. Chairman, although it is premature to predict the specific decisions on arms control that will result from this U.S. policy review, this Committee can rest assured that the United States will continue to uphold the principles of the 1967 Outer Space Treaty, which provides the fundamental guidelines required for the free access to, and use of, outer space by all nations for peaceful

purposes. The United States will continue to support the inherent right of individual or collective self-defense, as reflected in the UN Charter. The United States also will continue to:

- Reject any limitations on the fundamental right of the United States to operate in, and acquire data from, space.
- Conduct United States space activities in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.
- Highlight the responsibility of states to avoid harmful interference to other nations' peaceful exploration and use of outer space.
- Take a leadership role in international fora to promote policies and practices aimed at debris minimization and preservation of the space environment.

To further these goals, the United States will seek opportunities to work with other like-minded nations here in the United Nations and in other fora in the furtherance of international norms and standards that can help advance the common good and enhance stability and security in outer space. . . .

## **Cross References**

*MARPOL Annex VI (Regulations for the Prevention of Air Pollution from Ships),*

**Chapter 13.A.2.a.**

*Fisheries issues, Chapter 13.A.2.b.*

*Maritime boundary issues discussed in U.S. response to ILC questionnaire on transboundary oil and gas, Chapter 13.A.3.a.(1)*

*Conservation efforts in Antarctica, Chapter 13.A.3.c.*

*U.S. initiatives to protect cultural heritage, Chapter 14.*